In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1014

JAMES E. BRADEN, JR., PETITIONER

v.

IRVING M. HERMAN, DIRECTOR OF GENERAL COUNSEL'S OFFICE OF APPEALS, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In August 1969, petitioner James Braden began working at the Paul Mueller Company, which had a collective bargaining agreement with Local 146, Sheet Metal Workers' International Union, AFL-CIO, containing a valid union security provision requiring its employees to tender periodic dues and initiation fees to the Union as a condition of continued employment (A. 6-7).[1] In March 1970, Braden filed unfair labor practice charges with the Board's Regional Director alleging that the Union had violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act by causing the Company to discharge him

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[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with this Court.

for reasons other than his failure to tender periodic dues and initiation fees, and that the Company had violated Section 8(a)(1) and (3) by acquiescing in the Union's demand (A. 20-25). Following an investigation of the charges which revealed that Braden knew of the Union's dues paying procedures and that the consequence of falling two months behind in dues was automatic suspension from Union membership, the Regional Director concluded that Braden's employment had been terminated pursuant to a valid union security provision in the contract between the Company and the Union, and therefore declined to issue a complaint on the charges (A. 32-33).

Braden's appeal from this ruling to the General Counsel of the Board was denied on the ground that Braden's discharge was pursuant to lawful union security provisions, following his suspension from membership as a result of his dues arrearages for a two-month period. The General Counsel found that Braden had been informed of his dues obligations when he was hired, that notices had been posted at the plant advising employees that suspension from membership would result from dues arrearages of two months, and that Braden had conceded that he was aware of his arrearage in late February, before the Union had requested his discharge (A. 34-35).

Braden thereupon moved for reconsideration of the denial of the appeal (A. 36-39). Following a remand to the Regional Director for an additional investigation (A. 43-44), the General Counsel denied Braden's motion for reconsideration (App., *infra*, pp. 7-9). The General Counsel concluded that, since Braden had actual notice of his Union obligations and of the consequences of his failure to fulfill those obligations, the Union was not required to give Braden further notice of his delinquency before requesting his discharge. The General Counsel also con-

cluded that the Union's retention for about one week of the checks tendered by Braden for his past dues did not bar the Union from seeking Braden's discharge, since "* * * these checks were not sent until after the request for discharge and their retention was solely for the purpose of enabling the Union to make inquiry as to its legal position" (App., *infra*, p. 8).[2] Braden's second motion for reconsideration was also denied by the General Counsel (A. 104-105).

Braden filed suit in the district court to compel the General Counsel to issue a complaint based on his charges (A. 18-19). Pursuant to the Board's motion, the district court dismissed the complaint for lack of jurisdiction over the subject matter (Pet. App. 31-33). The court of appeals affirmed (Pet. App. 24-27). The court of appeals endorsed the general rule that "courts ordinarily have no jurisdiction to review the General Counsel's exercise of [his] authority" to issue complaints, and found no reason to depart from it in this case since both the Regional Director and the General Counsel had carefully investigated the facts and determined that there was no violation of the National Labor Relations Act (Pet. App. 26).

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[2] On the morning of March 4, 1970, union business agent Merritt telephoned Braden at his home and advised him that he was two months delinquent in payment of his Union dues and that therefore he had been suspended from Union membership and would lose his job with the Company. Later that morning, the Union advised the Company of Braden's delinquency and requested his discharge. Still later that day, Braden sent the Union a letter enclosing two checks, one for the dues arrearage and the other covering a reinstatement fee of $15. The Union returned the checks to Braden on March 11, when, in accordance with its policy of investigating a member's contentions before insisting that the Company effectuate a discharge request, it notified the Company to act on its March 4 request (A. 7, 9, 10, 64-65).

2. Section 3(d) of the Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 * * *." Under the uniform judicial interpretation of Section 3(d), federal courts have no jurisdiction to review the General Counsel's refusal to issue a complaint. *Saez* v. *Goslee,* 463 F. 2d 214 (C.A. 1), certiorari denied, November 20, 1972, No. 72-440. See also *Vaca* v. *Sipes,* 386 U.S. 171, 182, and cases cited by the court of appeals (Pet. App. 26, n. 2). Petitioner's attempts to avoid this settled rule are not well founded.

a. Petitioner contends that the General Counsel's decision not to issue a complaint "was based upon unlawful reasons and was in direct conflict with applicable Board and Court interpretations of the Act" (Pet. 15). This contention is based on the assumptions that the Union failed to carry out its duty of advising petitioner of his obligation under the union security provision, that petitioner tendered all monies which were claimed to be owed before the Union made a discharge demand upon the Company, and that the Union demanded petitioner's discharge, not because of dues delinquency, but because of his loss of formal union membership (Pet. 16-18). As pointed out above, however, the facts revealed by the General Counsel's extensive investigation show that petitioner was well aware of his obligation under the union security provision and of his delinquency before the Union requested his discharge, that the Union's discharge request was made before, not after, petitioner tendered the full amount of his past dues, and that the discharge was requested solely because of such delinquency. In these circumstances, the General Counsel's conclusion that peti-

tioner's discharge did not violate the Act was fully in accord with applicable Board and court decisions.[3]

b. Contrary to petitioner's further contention (Pet. 20-22), there is no constitutional requirement that the General Counsel afford him a hearing before deciding not to issue a complaint on petitioner's charges. The procedures followed by the General Counsel in this and

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[3] The cases relied on by petitioner (Pet. 17) are factually distinguishable. In *Granite City Steel Co.*, 169 NLRB 1009, 1011, the employee was never notified of his obligation to join the union, nor was he informed of the amount of dues owed or to whom it should be paid. *Judson Steel Corp.*, 192 NLRB No. 148, 78 LRRM 1137, 1138-1139, involved a new employee who was never informed of his dues-paying obligation despite an attempt to secure such information at the union hall; moreover, he worked 7 months without being challenged for arrearages despite a requirement that he join the union after 8 days of employment. The employee involved in *Conductron Corp.*, 183 NLRB No. 54, 76 LRRM 1862, was never informed of the union's complicated provision regarding maintenance of membership while on lay-off status, and the union failed to follow its normal practice of sending a delinquency notice prior to requesting his discharge. *Aerojet-General Corp.*, 186 NLRB No. 77, 75 LRRM 1337, 1338, involved an employee with over 13 years' tenure who had worked over 7 years without paying dues, and he was discharged without advance warning of his obligation. The employee in *Bulk Transport, Inc.*, 186 NLRB No. 47, 75 LRRM 1463, only knew there was a union in the plant which he could join, but was not informed of his obligation to do so (TXD, p. 4). In *IUE, Frigidaire, Local 801* v. *National Labor Relations Board*, 307 F. 2d 679 (C.A.D.C.), certiorari denied, 371 U.S. 936, the delinquent employee had not been informed of the nature of his obligation under a new collective bargaining agreement. And, in *National Labor Relations Board* v. *Hotel Employees' Union, Local 568*, 320 F. 2d 254, 256-258 (C.A. 3), neither employee had been informed of the amount of his dues obligation, although both employees had attempted to ascertain the amount from the union.

In *Machinists, District Lodge 508 (Lockheed Missiles and Space Co.)*, 190 NLRB No. 22, 77 LRRM 1075, 1076-1078 (Pet. 16), unlike here, the employee tendered the full amount of his dues delinquency *before* the union requested his discharge.

other cases fully meet the requirements of due process. See *Saez* v. *Goslee, supra.*

The remedies of the National Labor Relations Act protect public interests rather than merely private rights. *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261, 264-265. The General Counsel issues an unfair labor practice complaint only when he believes such action will effectuate the policies of the Act. Moreover, the General Counsel's determination not to issue a complaint is not a formal adjudication, but is similar to the decision of a prosecuting attorney whether to institute criminal proceedings—a decision usually made on the basis of an informal fact-finding investigation. Finally, as the court below noted (Pet. App. 27), "[r]equiring a trial-type hearing whenever a charging party disagrees with the decision of the Board officials would further complicate the Board's task of maintaining industrial peace and protecting employee and employer rights and would not serve the public interest."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1973.

APPENDIX

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

September 14, 1971

Re: Paul Mueller Company
Case No. 17-CA-4242

Local 146, Sheet Metal Workers'
Intl. Assn., AFL-CIO
(Paul Mueller Co.)
Case No. 17-CB-761

Donald W. Jones, Esq.
Church, Prewitt, Jones,
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110 Landmark Building
309 North Jefferson
Springfield, Missouri 65806

Dear Mr. Jones:

Your motion for reconsideration has been duly considered.

The motion is denied. Nothing was presented in the motion which warranted departure from our original decision. Contrary to your contention, none of the cases cited establishes that an employee with actual knowledge of his Union obligations and of the consequences of his failure to fulfill those obligations must be given further notice by the Union prior to a request for discharge in order to make that request for discharge lawful. In every case cited, the employee in question either lacked actual knowledge as to some significant element of his financial obligations or as to the consequences of failure to meet them, or special circumstances existed

which reasonably cast doubt or uncertainty on such knowledge which he had acquired.

In contrast, Braden knew what his Union obligations were and what the consequences would be if he failed to meet them because he was told by the Company when he was hired. He knew the amount of monthly dues and the extent of his arrearage because he had a recent receipt which would provide that information. He also knew that he had to make payment at the Union hall because he had been told by the night steward in February 1970, when he asked about the procedure for payment. Since Braden had actual knowledge of his Union obligations and the consequences of failure to perform them, the Union was under no duty to remind him of these facts prior to the request for his discharge.

Moreover, under all the circumstances, the Union's retention for about one week of the checks sent by Braden prior to returning them to him could not be deemed to constitute an acceptance of the proffered payment or a waiver of the right to request Braden's discharge, inasmuch as these checks were not sent until after the request for discharge and their retention was solely for the purpose of enabling the Union to make inquiry as to its legal position.

As to the contention that Braden was never initiated into the Union, the evidence established that, in accordance with the provisions of Article 16, Section 3(a), of the Union's contribution, Braden completed the standard form of application, subscribed to the obligation of membership, made the appropriate payments, and was thus duly inducted into membership.

Since Braden knew what his membership obligations were and what the consequences would be if he failed

to meet them, the fact that he did not have a copy of the collective bargaining agreement or the Union's constitution prior to the request for his discharge has no bearing on the matter. Finally, the evidence failed to establish that Braden was treated differently from other employees in similar circumstances.

Inasmuch as the Union's request for Braden's discharge was therefore lawful the Company's acquiescence to that request was also lawful.

Accordingly, we have no alternative but to adhere to our original decision in this case.

SINCERELY YOURS,

PETER G. NASH
General Counsel

IRVING M. HERMAN
Director, Office of Appeals

cc: Director, Region 17
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